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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 332

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JOHN H. JACKSON,
Respondent.

RESPONSIVE BRIEF ON BEHALF OF PETITIONER, SOUTHERN RAILWAY COMPANY

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I.

Respondent's Brief correctly points out the following:

1. There was ample evidence of negligence on the part of the Railway (whether the Railway owed Jackson, a United States Mail clerk, a duty of ordinary care or a duty of extraordinary care is neither crucial nor germane to the present issue).

2. A trial Judge generally must not leave to jury determination a question as to which there is *absolutely no evidence.*

3. A Trial Court should grant a directed verdict when the evidence is such that there are no controverted issues of fact upon which reasonable men could differ.

Respondent's Brief does *not* point out the following.

1. If there is *any* evidence at all upon a given germane question, the trial Judge is under a duty to submit that question to the jury.

2. If on the question of liability there is under the evidence *any* controverted issue of fact upon which reasonable men could differ, it is error for the Trial Judge to direct a verdict as to liability.

3. The Trial Judge, a reasonable man, thought during the trial that there were *some* evidences from which the jury would be authorized (though not required) to find that Jackson (*a Railway Fireman of long experience*, but on the day in question employed by the United States as a Mail Clerk) was guilty of negligence contributing to his injury and thus under Georgia Law going in diminishment of any damage to which he might otherwise be entitled.

4. The Trial Judge, a reasonable man, upon the reflection afforded by a motion for new trial in behalf of Jackson (who was not satisfied with the amount of his recovery ($2,500.00) but who even if liability had been absolute obtained a quite adequate recovery) still concluded that there was *some* evidence in the record from which the jury would have been authorized (but not required) to find that Jackson was guilty of negligence contributing to his injury.

5. In denying Jackson's motion for new trial, the Trial Judge wrote an opinion conclusively demonstrating that there was some evidence from which the jury would have been authorized (but not required) to find that Jackson under Georgia Law was guilty of contributory negligence with the result that it would have been error to fail to give an instruction upon the subject of contribu-

tory (comparative) negligence and that it would have been error to direct a verdict in favor of Jackson on liability. (The petition for Certiorari cites chapter and verse buttressing the opinion of the Trial Court.)

6. The Court of Appeals, improperly construing the evidence most strongly against petitioner, rather than most strongly in favor of the leaving of the issue to the jury, reversed the Trial Court, thereby holding in effect that under the evidence presented upon the trial, petitioner's liability was absolute and no jury question was presented.

II.

The statement in Respondent's Brief that

". . . there is no evidence in the case to show that the pulling of the emergency cord would have prevented the accident or would have diminished the impact between the two trains or lessened respondent's injuries."

is wholly incorrect. In rebuttal of Respondent's assertion quoted above, see the opinion of the Trial Judge quoted on page nine (9) of the Petition For Certiorari, and review pages five (5), six (6), and seven (7) of the Statement of Facts of the Petition for Certiorari.

III.

The Trial Judge recognized and applied the doctrine that questions of negligence, contributory negligence, and proximate cause are for the jury. The Court of Appeals decided to make itself the trier of the facts. To this end, it harshly construed the evidence in the same fashion as would a juror who happened to disagree with the Railway's position on the issue. The Court of Appeals should have construed the evidence liberally in favor of a jury question and in favor of upholding the action of the Trial

Court—which action the Trial Court confirmed by denying motion for new trial.

IV.

This Court is committed to the doctrine that questions of negligence are for the jury and that the evidence must be liberally construed to this end. This Court is committed to the doctrine that "what is sauce for the goose is sauce for the gander," to-wit:

In determining whether a Plaintiff, upon whom the burden of proof of Defendant's negligence rests, may go to a jury, the evidence must be liberally construed in favor of a jury issue. Similarly, in determining whether a Defendant, upon whom the burden of proof of contributory negligence rests, can go to a jury on that issue, the evidence must be just as liberally construed in favor of a jury issue

Petition for Certiorari should be granted.

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CERTIFICATE

Copies mailed to opposing counsel as per Certificate of Service on file.